UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

GEORGE E. BATCHELDER,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 03-42-B-W***
	)	
JO ANNE B. BARNHART,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") appeal raises the question whether the commissioner properly found that the plaintiff, who alleges that he has been disabled from working since March 1, 1996 by depression, high blood pressure, blurred vision, hearing loss and problems with his neck, left leg, hip and ankle, was not disabled as of March 31, 1996, his date last insured. I recommend that the decision of the commissioner be affirmed.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. § 404.1520, *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative

[1] This action is properly brought under 42 U.S.C. § 405(g). The commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on December 11, 2003, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

law judge found, in relevant part, that the plaintiff had acquired sufficient quarters of coverage to remain insured only through March 31, 1996, Finding 1, Record at 24; that as of his date last insured he had no impairment that significantly limited his ability to perform basic work-related functions and therefore did not have a severe impairment, Finding 4, *id*.; and that, therefore, he was not under a disability at any time through his date last insured, Finding 5, *id*. at 25. The Appeals Council declined to review the decision, *id*. at 6-7, making it the final determination of the commissioner, 20 C.F.R. § 404.981; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 405(g); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge reached Step 2 of the sequential evaluation process. Although a claimant bears the burden of proof at this step, it is a *de minimis* burden, designed to do no more than screen out groundless claims. *McDonald v. Secretary of Health & Human Servs.*, 795 F.2d 1118, 1123 (1st Cir. 1986). When a claimant produces evidence of an impairment, the commissioner may make a determination of non-disability at Step 2 only when the medical evidence "establishes only a slight abnormality or combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work even if the individual's age, education, or work experience were specifically considered." *Id.* at 1124 (quoting Social Security Ruling 85-28).

The plaintiff preliminarily complains that in view of the fact that he was found disabled in 1998 for purposes of an award of Supplemental Security Income ("SSI") benefits, the administrative law judge erred as a matter of law in rejecting his claim at Step 2 on the basis of lack of contemporaneous medical evidence rather than applying Social Security Ruling 83-20 ("SSR 83-20") to infer the onset date of his acknowledged disability. *See* Plaintiff's Itemized Statement of Specific Errors ("Statement of Errors") (Docket No. 8) at 2-10. Secondarily, he asserts that (i) the administrative law judge conducted a flawed credibility analysis and (ii) the Appeals Council erred in determining that voluminous medical evidence submitted subsequent to the administrative law judge's decision, bearing on the plaintiff's status on or prior to his date last insured, provided "no basis" for changing that decision. *See id*. at 10-14.[2] I find no reversible error.

I. Discussion

A. Failure To Apply SSR 83-20

At the outset of the plaintiff's hearing, held on January 31, 2000, the administrative law judge stated: "From what I understand, Mr. Batchelder is currently receiving SSI benefits with an alleged onset date or an established onset date of 10/1/98. Is that correct, Mr. Ferris?" Record at 29. Ferris, then the plaintiff's counsel, responded: "That's correct." *Id*. At the conclusion of the hearing, the administrative law judge commented: "I think I have a picture of it. And, I'll try to do whatever I can. And, I know that certain things might have to be inferred back. But, I'll look at the total picture." *Id*. at 74.

In using the phrase "inferred back," the administrative law judge impliedly referred to SSR 83-20,

[2] In his Statement of Errors, the plaintiff raises a question whether the administrative law judge herself had a duty to reconsider her decision following submission of the belated evidence. *See* Statement of Errors at 11-12. However, he concedes that he is unable to find authority that an administrative law judge has such an obligation, *see id*., and, at oral

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which provides:

> In addition to determining that an individual is disabled, the decisionmaker must also establish the onset date of disability. In many claims, the onset date is critical; it may affect the period for which the individual can be paid and may even be determinative of whether the individual is entitled to or eligible for any benefits.
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> SSR 83-20, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991, at 49.

That ruling contemplates the possibility that a process of inference may be necessary, providing:

> In some cases, it may be possible, based on the medical evidence to reasonably infer that the onset of a disabling impairment(s) occurred some time prior to the date of the first recorded medical examination, e.g., the date the claimant stopped working. How long the disease may be determined to have existed at a disabling level of severity depends on an informed judgment of the facts in the particular case. This judgment, however, must have a legitimate medical basis. At the hearing, the administrative law judge (ALJ) should call on the services of a medical advisor when onset must be inferred. . . .
>
> If reasonable inferences about the progression of the impairment cannot be made on the basis of the evidence in file and additional relevant medical evidence is not available, it may be necessary to explore other sources of documentation. Information may be obtained from family members, friends, and former employers to ascertain why medical evidence is not available for the pertinent period and to furnish additional evidence regarding the course of the individual's condition. . . . The impact of lay evidence on the decision of onset will be limited to the degree it is not contrary to the medical evidence of record. . . .
>
> The available medical evidence should be considered in view of the nature of the impairment (i.e., what medical presumptions can reasonably be made about the course of the condition). The onset date should be set on the date when it is most reasonable to conclude from the evidence that the impairment was sufficiently severe to prevent the individual from engaging in SGA (or gainful activity) for a continuous period of at least 12 months or result in death. Convincing rationale must be given for the date selected.

Id. at 51-52.

Although the administrative law judge acknowledged at hearing the possibility of a need to infer onset date, she did not do so in her decision, treating the plaintiff's SSD application as though no favorable

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argument, counsel for the plaintiff clarified that he does not press this as a point of error.

SSI determination ever had been made. *See* Record at 22-25. She then denied the claim at Step 2 on the basis of lack of contemporaneous medical evidence. *See id*. at 23-24. A failure to apply SSR 83-20 is error; however, it has been held not to constitute reversible error if the rule's dictates nonetheless are heeded. *See, e.g., Field v. Shalal* [sic], No. CIV. 93-289-B, 1994 WL 485781, at *3 (D. N.H. Aug. 30, 1994) ("The ALJ's failure to explicitly rely on SSR 83-20 does not by itself require remand. In this case, however, the ALJ's reasoning also fails to comport with SSR 83-20's substantive requirements.") (citation omitted).

Counsel for the commissioner contended at oral argument – and I agree – that the failure to apply SSR 83-20 in this case was not outcome-determinative. As counsel noted, SSR 83-20 mandates that any decision concerning onset date comport with objective medical evidence. The record before the administrative law judge contained only two pieces of roughly contemporaneous medical evidence: a report dated April 7, 1996 reflecting treatment for a probable viral syndrome (flu) and a report dated March 19, 1996 detailing treatment for bronchitis and flu symptoms. *See* Record at 236-40. One of these records, that of April 7, 1996, reflected that the plaintiff was "normally in good health." *Id*. at 237.

The record presented to the administrative law judge also contained extensive evidence post-dating the plaintiff's date last insured of March 31, 1996. *See, e.g., id*. at 257-441. That body of evidence did contain some recorded self-reports from the plaintiff concerning his condition prior to March 31, 1996; however, these reports were not consistent as to the timing of the claimed impairments. *Compare, e.g., id.* 257 (plaintiff reported to have told Disability Determination Services ("DDS") examining physician Tim Manahan, D.O., on November 25, 1998 that he began having left arm and neck pain in 1989) *with id*. at 332 (plaintiff reported to have told Maine Dartmouth Family Practice on December 18, 1997 "that neck +

shoulder pain followed back pain, which he says has been present since a fall 1½ yrs. ago.").

In short, under these circumstances, I discern no reversible error in the administrative law judge's failure to apply SSR 83-20.

B. Credibility Determination

The plaintiff next asserts that the administrative law judge violated Social Security Ruling 96-7p ("SSR 96-7p") when she rejected his explanation that he had not sought medical treatment prior to his date last insured because he could not afford it. *See* Statement of Errors at 10-11. This argument is without merit. SSR 96-7p merely requires that an administrative law judge consider – not necessarily accept – a claimant's explanation for lack of medical treatment. *See* SSR 96-7p, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (Supp. 2003), at 140 ("[T]he adjudicator must not draw any inferences about an individual's symptoms and their functional effects from a failure to seek or pursue regular medical treatment without first considering any explanations that the individual may provide[.]"). The administrative law judge in this case duly considered the plaintiff's explanation; however, she chose to reject it on the basis that some degree of medical care is available without insurance or financial resources. *See* Record at 24. Further, she based her overall credibility determination not only on the plaintiff's lack of contemporaneous medical treatment but also on the fact that one of the only two contemporaneous records provided to her indicated that the plaintiff denied any serious health issues. *See id*. There is no reversible error. *See Frustaglia v. Secretary of Health & Human Servs.*, 829 F.2d 192, 195 (1st Cir. 1987) ("The credibility determination by the ALJ, who observed the claimant, evaluated his demeanor, and considered how that testimony fit in with the rest of the evidence, is entitled to deference, especially when supported by specific findings.").

C. New Evidence Presented to Appeals Council

The plaintiff finally invokes *Mills v. Apfel*, 244 F.3d 1 (1st Cir. 2001), in support of the proposition that the Appeals Council committed reversible error in determining that tardily submitted evidence did not "provide a basis for changing the Administrative Law Judge's decision." Statement of Errors at 12 (quoting Record at 6).

At oral argument, counsel for the commissioner cited *Mills*, 244 F.3d at 5-6, for the proposition that a court is powerless to order remand based on belated submission of evidence to the Appeals Council absent "good cause" for a claimant's tardiness, which he asserted had not been demonstrated in this case. I agree that no such good cause has been shown, but I disagree that it need be. *Mills* stands for the proposition that there are two circumstances under which remand for the consideration of tardy evidence is appropriate: (i) when that evidence is new and material and a claimant demonstrates good cause for its belated submission and (ii) when, regardless whether there is such good cause, the Appeals Council has given an "egregiously mistaken ground" for its action in refusing review in the face of such late-tendered evidence. *Mills*, 244 F.3d at 5-6.

While a claimant therefore need not demonstrate good cause, he or she still faces an uphill battle in persuading a reviewing court that the Appeals Council's stated reason for discounting the impact of late-submitted evidence was "egregiously mistaken." The plaintiff in this case falls short of doing so.

The bulk of the material submitted to the Appeals Council (which is marked as Exhibit AC-1 and spans pages 442-592 of the Record) concerns the plaintiff's diagnosis of, and treatment for, alcoholism from 1993 through 1995. *See, e.g.*, Record at 466-69, 495-536, 540-57. On March 29, 1996 Congress enacted Pub. L. No. 104-121, eliminating drug or alcohol addiction as a basis for obtaining disability

benefits. *See* Historical and Statutory Notes to 42 U.S.C. §§ 423, 1382c; *Jones v. Apfel*, 997 F. Supp. 1085, 1093 (N.D. Ind. 1997). Thus, to the extent the new materials evidence the impairment of alcoholism, they do not in fact provide a basis for changing the administrative law judge's decision.

The plaintiff does not argue that his alcoholism should have been factored in as a disabling condition; however, he does contend that the tardily submitted evidence demonstrated the onset of at least a psychological condition and a neck/shoulder/back condition prior to his date last insured (thus calling into doubt the administrative law judge's subjective-pain and credibility findings). *See* Statement of Errors at 12-13. Nonetheless, this evidence in its totality is not such as to demonstrate that the Appeals Council was egregiously mistaken in holding that the materials provided no basis for altering the Step 2 finding of non-severity as of the plaintiff's date last insured.

With respect to the claimed neck, shoulder and back condition, the new materials include a letter dated September 7, 2000 from treating physician William Alto, M.D., stating, in relevant part:

> [T]o refresh your memory he [the plaintiff] was seen here on 12/18/97 by myself. At that time Mr. Batchelder gave a history of having lower back pain and pain in his left shoulder and neck pain along with tingling along the C 6 dermatome. He dated this problem back to a year and a half ago when he had a fall and fractured his left ankle. Our impression at that time was that he had neck, shoulder, and arm pain and x-rays were taken. At that time the x-rays showed degenerative disc disease of C 5, 6 and C 6, 7 or cervical spondylosis in his neck. It would appear to me that this disease dates back perhaps several years from his examination on 12/18/97 although I can not tell you the exact date that his x-ray began to appear abnormal.
>
> From Mr. Batchelder's statements on 12/18/97 it seems quite likely that his injuries incurred 18 months ago may well have resulted in this problem. I have no reason to believe otherwise.

Record at 491. Although the letter is somewhat ambiguous as to the timing of these problems, it reasonably can be read as only definitively dating them from approximately June 1996 – subsequent to the plaintiff's

date last insured.[3]

With respect to the claimed psychological problems, there is indeed evidence of the existence of a medically determinable impairment (seemingly segregable from the plaintiff's alcoholism) prior to his date last insured. *See, e.g., id*. at 455 (letter dated August 10, 2000 from John A. Arness, M.D., who had diagnosed the plaintiff as totally disabled from severe anxiety and major depression as of July 27, 2000, stating that Dr. Arness had reviewed plaintiff's alcohol-treatment records from 1993-96 and noted that "[i]nterspersed throughout the records from New Directions, are frequent comments documenting the counselors['] concern that he received treatment for ongoing anxiety and depression."), 459 (1993 psychological evaluation by Jeff Matranga, Ph.D., finding that plaintiff suffered from possible mild depression and high level of anxiety), 494 (letter received by Social Security Administration on September 20, 2000 from Dr. Matranga stating: "From what George says and from some of the records he showed me . . ., it sounds like he has had fairly consistent difficulties with anxiety, depression, alcohol, and functioning from 1993 through the present.").

Nonetheless, neither the retrospective nor the contemporaneous materials contained within Exhibit AC-1 describe any specific limitations on the plaintiff's ability to work stemming from his mental impairments prior to March 31, 1996. Inasmuch as appears, there were no such notable limitations as of that time. *See, e.g., id*. at 460 (1993 report by Dr. Matranga noting that plaintiff was self-employed and had been fairly successful in his salvage-yard business; recommending that plaintiff obtain structured relaxation training), 543 (report by counselor Rae Kinney, LSAC, dated January 6, 1993 describing plaintiff's "problem list" as consisting of alcohol abuse, workaholism and problems at home with his wife

[3] It is also noteworthy that in filling out a medical questionnaire for the New Directions alcohol-abuse treatment program,
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caused by alcohol).

Accordingly, the plaintiff fails to demonstrate reversible error on the part of the Appeals Council in declining to disturb the decision of the administrative law judge when presented with the materials marked as Exhibit AC-1.

II. Conclusion

For the foregoing reasons, I recommend that the decision of the commissioner be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 15th day of December, 2003.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

Plaintiff

GEORGE E BATCHELDER represented by **FRANCIS JACKSON**
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the plaintiff checked "no" when asked whether he had any physical worries at that time. *See* Record at 495.

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